



CONVERSION OF NONPROFIT HOSPITAL

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QUESTION

What is the law regarding the process for a nonprofit hospital to convert to for-profit? This report updates OLR Report [2012-R-0031](#).

SUMMARY

By law, a nonprofit hospital needs approval of the attorney general and public health (DPH) commissioner to sell or otherwise transfer a material amount of its assets or operations or to change the control of its operations to a for-profit entity ([CGS §§ 19a-486 to 486h](#)). Any agreement without such approval is void.

Before the transaction, the hospital and purchaser must concurrently submit a certificate of need (CON) determination letter to DPH and the attorney general. The attorney general must determine if the agreement involves a material amount of the nonprofit hospital's assets or operations or a change in control of its operations. If he determines that it does, the DPH commissioner and attorney general then give the hospital and purchaser a more detailed application to complete.

The commissioner and attorney general must each review the proposed agreement. They can approve the agreement, approve it with modifications, or disapprove it. The law sets the criteria and time periods for review. The attorney general and commissioner may subpoena individuals, issue written interrogatories, and contract with experts or consultants when conducting their reviews. In addition, DPH must determine whether to approve the request for CON authorization that is part of the application.

Among other changes affecting this process, [PA 14-168](#) requires the purchaser and hospital to hold a public hearing on the CON determination letter, in the municipality where the new hospital would be located. Existing law also requires the attorney general and commissioner to hold at least one joint public hearing in the primary service area of the nonprofit hospital before approving or disapproving the proposed agreement.

A hospital or purchaser can appeal if the attorney general or commissioner deny the application or approve it with modifications.

The nonprofit conversion statute was enacted in 1997 ([PA 97-188](#)) and has been amended several times since then. So far, the only transaction completed under the law was the 2001 approval of Essent Healthcare's purchase of Sharon Hospital. For more information about that decision, see OLR Report [2001-R-0811](#), as well as the attorney general's decision approving the transaction, available at http://www.ct.gov/ag/lib/ag/press_releases/2001/health/shfinal.pdf.

NONPROFIT HOSPITAL CONVERSION LAW

Approval Requirement

The law prohibits a nonprofit hospital from entering into an agreement to sell or otherwise transfer a material amount of its assets or operations or to change control of operations to a for-profit entity without the approval of the attorney general and DPH commissioner. These provisions apply as well to any entity affiliated with a nonprofit hospital through governance or membership, including holding companies or subsidiaries.

The nonprofit conversion law specifies that all references to the DPH commissioner include the commissioner's designee ([CGS §§ 19a-486, 19a-486a](#)). ([PA 14-168](#) (§ 9) made changes to CGS § 19a-486a, adding an additional hearing requirement discussed below.)

Certificate of Need Determination Letter

Before the transaction, the hospital and purchaser must concurrently submit a CON determination letter to the commissioner and attorney general by serving it on them by certified mail, return receipt requested, or hand delivery to each office. The letter must contain (1) the hospital's and purchaser's names and addresses; (2) a brief description of the proposed agreement terms; and (3) the estimated capital expenditure, cost, or value associated with the proposed agreement. The letter is subject to disclosure under the Freedom of Information Act (FOIA) ([CGS § 19a-486a](#)).

DPH's Office of Health Care Access (OHCA) administers the CON program. Generally, CON authorization is required when a health care facility proposes (1) establishment of new facilities or services, (2) a change in ownership, (3) the purchase or acquisition of certain equipment, or (4) termination of certain services. See below for a discussion of the CON review factors.

Public Hearing on Letter. [PA 14-168](#) (§ 9), effective upon passage, requires the purchaser and hospital to hold a hearing on the contents of the CON determination letter, no later than 30 days after the commissioner and attorney general receive it. The hearing must be held in the municipality where the new hospital would be located. At least two weeks before the hearing, the hospital must provide public notification of the hearing in a newspaper for at least three consecutive days. The notice must contain substantially the same information as the letter, and must be provided in a newspaper with substantial circulation in the affected community.

Under the act, the purchaser and hospital must record and transcribe the hearing and make the recording or transcript available to the commissioner, attorney general, or public upon request.

Conversion Application

The commissioner and attorney general must review the CON determination letter, with the attorney general determining whether the proposed agreement requires approval under the nonprofit conversion law. If it does, they must give the hospital and purchaser an application, unless the commissioner refuses to accept the letter.

The application form must require:

1. the hospital's and purchaser's names and addresses;
2. a description of the proposed agreement's terms;
3. copies of all contracts, agreements, and memoranda of understanding relating to the proposed agreement;
4. a fairness evaluation by an independent person expert in these agreements that applies the criteria established by law for the attorney general's review of the agreement (see below);
5. documentation that the hospital exercised due diligence in deciding to transfer, selecting the purchaser, obtaining the fairness evaluation, and negotiating the terms and conditions of the transfer, including disclosing the terms of any other offers the hospital rejected and why; and

6. other information the attorney general or commissioner deem necessary to conduct their review under the nonprofit conversion law and the CON law.

The application is subject to disclosure under FOIA ([CGS § 19a-486a](#)).

Filing of Application

The purchaser and hospital must concurrently file the application with the commissioner and the attorney general within 60 days after the application form is mailed to them. The commissioner and the attorney general must review the application and determine whether it is complete. They must, within 20 days after receiving it, give written notice to the purchaser and hospital of any deficiencies. The application is not deemed complete until these deficiencies are fixed.

Within 25 days after receiving the complete application, the commissioner and attorney general must jointly publish a summary of the agreement in a general circulation newspaper in the hospital's area ([CGS § 19a-486a](#)).

Timeframe for Application Review

Within 120 days after receiving the completed application, the attorney general and commissioner must either approve it (with or without modification) or deny it. The commissioner must also determine whether to approve, with or without modification, or deny the request for CON authorization that is part of the application, according to the law regarding CON determinations. The commissioner must make the CON decision within the same time period as the completed application.

The 120-day deadline can be extended if the attorney general, commissioner, hospital, and purchaser all agree. The deadline is tolled (delayed) for legal action taken by the attorney general to enforce a subpoena related to the attorney general's or commissioner's review, as described below. It is tolled until the final court decision, including any appeal or time for filing an appeal.

The application is deemed approved if the commissioner and the attorney general do not act within the 120-day period, unless extended ([CGS § 19a-486b](#)). ([PA 14-168](#) (§ 10) made changes to this statute, specifically allowing conditions on the application's approval as discussed below.)

Attorney General's Review

Standards for Approval. The attorney general must disapprove an application as not in the public interest if he determines any of the following:

1. the transaction is prohibited by state statutory or common law on nonprofits, trusts, or charities;
2. the hospital did not exercise due diligence in deciding to transfer, selecting the purchaser, obtaining an independent expert's fairness evaluation, or negotiating the transfer's terms and conditions;
3. the hospital did not disclose conflicts of interest, including those related to board members, officers, key employees, and experts of the hospital, purchaser, or other party to the transaction;
4. the hospital will not receive fair market value for its assets (the most likely price the assets would bring in a competitive and open market sale under all conditions needed for a fair sale, with the buyer and seller acting prudently, knowledgeably, and in their own best interest, and with a reasonable exposure time in the open market);
5. the assets' fair market value was manipulated, causing their value to decrease;
6. the hospital's financing of the transaction will put the assets at unreasonable risk;
7. any management contract being considered is not for reasonable fair value;
8. a sum equal to the fair market value of the hospital's assets (a) is not being transferred to one or more persons selected by the Superior Court who are not affiliated through corporate structure, governance, or membership with the hospital or purchaser, unless the hospital continues to operate on a nonprofit basis after the transaction and the sum is transferred to the nonprofit to provide health care services and (b) is not being used for any of the following: appropriate charitable health care purposes consistent with the hospital's original purpose, support and promotion of health care generally in the affected community, or in the case of assets subject to a use restriction imposed by a donor, for a purpose consistent with the donor's intent; or
9. the hospital or purchaser has not provided the attorney general with sufficient information to adequately evaluate the agreement, if the attorney general has notified the hospital or purchaser of the inadequacy and provided a reasonable opportunity to remedy it ([CGS § 19a-486c](#)).

Subpoena Power. While reviewing the agreement, the attorney general can issue and serve written subpoenas on people to appear before him and testify or provide documents on any matters relevant to his review. He can also issue written interrogatories for answers under oath on any matters relevant to his review with a return date allowing for a reasonable response time.

The attorney general can apply to Superior Court for the Hartford Judicial District to enforce the subpoena when a person fails to comply. The court, after notice, can order compliance.

Service of subpoenas, notices of depositions, and written interrogatories can be made by (1) personal service at the person's usual residence or (2) certified mail, return receipt requested, addressed to the person's residence or principal place of business ([CGS § 19a-486c](#)).

Expert Consultants. The law allows the attorney general to contract with experts or consultants for assistance in reviewing the agreement. This includes assistance in independently determining the fair market value of the hospital's assets. The attorney general can appoint or contract with another person to conduct the required review and make recommendations to him. The attorney general must submit any bills for such contracts to the purchaser, who must pay these costs within 30 days after receipt. Bills for these services cannot exceed \$500,000 ([CGS § 19a-486c](#)).

DPH's Review

Standards for Approval. The commissioner must deny an application unless she finds that:

1. the affected community will be assured of continued access to high quality and affordable health care, after accounting for any proposed change impacting hospital staffing ([PA 14-168](#) (§ 11), effective upon passage, added the conditions that the care be high quality and that the continued access is after accounting for any proposed change impacting staffing);
2. the purchaser has committed to providing health care to uninsured or underinsured people, if the asset or operation being transferred provides or has provided health care to these people;
3. safeguards are in place to avoid a conflict of interest in patient referral if health care providers or insurers are offered investment or ownership opportunities in the purchaser or a related entity; and
4. CON authorization is justified according to law ([CGS § 19a-486d](#)).

Subpoena Power. The commissioner, in reviewing the agreement, can issue written subpoenas and interrogatories under the same procedures and conditions as for the attorney general's review. The commissioner, through the attorney general, can apply to Superior Court to enforce compliance ([CGS § 19a-486d](#)).

Expert Consultants. The law allows the commissioner to contract with any person, including financial or actuarial experts or consultants, or legal experts with the attorney general's approval, to assist with the application review. The commissioner must bill the purchaser for such contracts; the bills cannot exceed \$150,000. The purchaser must pay the bills within 30 days after receiving them ([CGS § 19a-486d](#)).

Public Hearing

By law, the attorney general and commissioner must jointly hold at least one public hearing before making any decision on the proposed agreement. One hearing must be in the hospital's primary service area. Notice of the hearing's time and place must be given at least 14 days before by publication in one or more general circulation newspapers in the affected community ([CGS § 19a-486e](#)).

Any person can seek to intervene at the public hearing according to the contested case provisions of the Uniform Administrative Procedure Act (UAPA) ([CGS § 19a-486a](#)).

Conditions on Approval

[PA 14-168](#) (§ 10) specifically allows the commissioner and attorney general, when approving an application, to place any conditions on their approval that relate to the purposes of the conversion law. This provision was effective upon passage.

Appeal Right

After exhausting administrative remedies, the hospital or purchaser can appeal to the Superior Court the attorney general's or commissioner's decision to disapprove the proposed agreement or approve it with modifications. The law specifies that it must not be construed as applying the UAPA to the attorney general's proceedings ([CGS § 19a-486f](#)).

DPH License Authority

The commissioner must refuse to license a nonprofit hospital or, if already licensed, suspend or revoke the license, if the commissioner finds after a hearing and an opportunity to be heard that:

1. a transaction occurred involving the transfer of a material amount of a hospital's assets or operations or a change in control of operations to a for-profit entity without the commissioner's approval (if required);
2. such a transaction occurred without the attorney general's approval (if required) and he certifies to the DPH commissioner that the transaction involved a material amount of the hospital's assets or operations or a change in control of operations; or
3. the hospital is not complying with the terms of the agreement approved by the attorney general and commissioner under the nonprofit conversion law ([CGS § 19a-486g](#)).

Construction of Governing Law

The conversion law specifies that it does not limit the (1) attorney general's common law or statutory authority; (2) DPH commissioner's statutory authority, including as to licensing and CON authority; or (3) application of the "cy pres" or "approximation" doctrines ([CGS § 19a-486h](#)).

Under the "cy pres" doctrine, when an original charitable purpose becomes impossible or impractical to fulfill, the court substitutes charitable purposes that are as close as possible to the original.

Under the "approximation" doctrine, the precise terms of a charitable trust can be varied under certain circumstances. It is used only when, on failure of the charitable trust, the court finds a general charitable intent. Under this doctrine, the general intent of the donor is carried out as nearly as can be even if the particular method contemplated by the donor cannot be followed.

CERTIFICATE OF NEED REVIEW FACTORS

As noted above, a hospital seeking to transfer a material amount of its assets or operations or to change the control of its operations to a for-profit entity must receive CON authorization, as part of the conversion approval process.

When reviewing a CON application, OHCA must consider and make written findings on the following guidelines and principles:

1. whether the proposed project is consistent with any applicable policies and standards in DPH regulations;
2. the relationship of the proposal to the statewide health care facilities and services plan;

3. whether there is a clear public need for the proposed health care facility or services;
4. whether the applicant has satisfactorily demonstrated (a) how the proposal will affect the financial strength of the state's health care system or (b) that the proposal is financially feasible for the applicant;
5. whether the applicant has satisfactorily demonstrated how the proposal will improve the quality, accessibility, and cost-effectiveness of health care delivery in the region, including the (a) provision of or change in access to services for Medicaid recipients and indigent people and (b) impact on the cost effectiveness of providing access to Medicaid services;
6. the applicant's past and proposed provision of health care services to relevant patient populations and payer mix, including access to services by Medicaid recipients and indigent people;
7. whether the applicant has satisfactorily (a) identified the population to be served by the proposed project and (b) demonstrated that this population needs the proposed services;
8. the use of existing health care facilities and services in the applicant's service area;
9. whether the applicant has satisfactorily demonstrated that the proposed project will not result in unnecessary duplication of existing or approved health care services or facilities;
10. whether an applicant who failed to provide, or reduced access to, services by Medicaid recipients or indigent people demonstrated good cause for doing so (good cause is not demonstrated solely based on differences in reimbursement rates between Medicaid and other payers);
11. whether the applicant has satisfactorily demonstrated that the proposal will not negatively impact the diversity of health care providers and patient choice in the region; and
12. whether the applicant has satisfactorily demonstrated that any consolidation resulting from the proposal will not adversely affect health care costs or accessibility to care.

The last two factors were added by [PA 14-168](#) (§ 7), effective July 1, 2014.

OHCA, as it deems necessary, may revise or supplement these guidelines and principles through regulation ([CGS § 19a-639](#)).

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